UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DISTRICT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. 4:16 CR 429 HEA (PLC)
	)	
DESHAWN DENTON,	)	
	)	
Defendant.	)	

UNITED STATES OF AMERICA'S MEMORANDUM IN OPPOSITION TO DEFENDANT DESHAWN DENTON'S MOTION TO SUPPRES ALL EVIDENCE RELATED TO ALLEGED VICTIMS' IDENTIFICATION OF DEFENDANT WHEN PRESENTED WITH "SEQUENTIAL PHYSICAL LINEUP"

COMES NOW the United States of America and, in opposition to Defendant Deshawn Denton's Motion to Suppress All Evidence Related to Alleged Victims' Identification of Defendant When Presented with "Sequential Physical Lineup" (District Court Docket "DCD" # 79), states as follows:

I. INTRODUCTION

On September 28, 2016, a Federal Grand Jury returned a six-count indictment charging defendant Deshawn Denton ("Defendant") with two counts of carjacking, in violation of Title 18, United States Code, Section 2119; one count of kidnapping, in violation of Title 18, United States Code, Section 1201; and three counts of brandishing a firearm in furtherance of those crimes of violence, in violation of Title 18, United States Code, Section 924(c). On February 7, 2017, Defendant filed with the Court a Motion to Suppress All Evidence Related to Alleged Victims' Identification of Defendant When Presented with "Sequential Physical Lineup" (DCD # 79).

In his motion, Defendant seeks a hearing on the admissibility of a photographic lineup presented to two victims who Defendant carjacked and then kidnapped on February 9, 2016. In support thereof, Defendant mistakenly claims that the victims were shown only Defendant's photograph during the lineup and, thus, the identification procedures were unduly suggestive and created a substantial likelihood of misidentification. (DCD # 79, p. 3).

Defendant's motion is entirely meritless. First, the line-up identification procedures used in this case were proper and not suggestive. Second, assuming for purposes of argument that the procedures are construed to be suggestive (they were not), both identifications were reliable. Accordingly, Defendant's motion to suppress should be denied.

II. BACKGROUND[1]

At approximately 3:30 am, on February 9, 2016, St. Louis Metropolitan Police Department ("SLMPD") officers responded to the Casino Queen located at 200 South Front Street, East St. Louis, Illinois, for a robbery. Upon arrival, officers were advised by victims M.U. and B.R. that they were carjacked at gunpoint in front of 1212 Washington Avenue, in the City of St. Louis, within the Eastern District of Missouri. The victims explained that while sitting in M.U.'s white Nissan Maxima two suspects, whose clothing matched that of the suspects in a carjacking occurring two days prior, approached the passenger side and asked how to get to the Rock Road. The male suspect, who the victims later identified as Defendant, then pointed a black gun at them and took B.R.'s purse, containing her wallet and cell phone. The female suspect, later identified as

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1 As always, this memorandum is not offered as a comprehensive statement of the United States' case. It is not intended to be in the nature of a Bill of Particulars that would fix and/or bind the United States to a set theory of proof. Instead, the purpose of this memorandum is to provide the Court with an outline of some of the United States' evidence.

co-defendant Kendreal Graham ("Graham"), then ran around to the driver's side, opened the driver's door, searched M.U.'s pockets, and took his cell phone. The victims were then ordered to get into the backseat.

With Graham driving and Defendant in the passenger seat, the victims were taken to the Advantage Bank located at 13 Collinsville Avenue in East St. Louis, Illinois, where Graham used B.R.'s debit card to withdraw approximately $400 from the ATM machine. The victims were then driven halfway back across the Eads Bridge, whereupon Graham made a u-turn and drove to the parking lot entrance of the Casino Queen where they were released. The victims ran to a Casino Queen security vehicle, and Graham and Defendant then drove away in M.U.'s vehicle. The victims advised that during the kidnapping, Defendant repeatedly threatened to shoot and kill them. M.U.'s Nissan Maxima was later recovered unoccupied at 1000 Division Street, East St. Louis, Illinois.

Thereafter, on February 10, 2016, SLMPD officers responded to Fay Furniture Inc. pawn shop located at 439 Collinsville Avenue, in East St. Louis, Illinois. An employee of the pawn shop determined that M.U.'s ring and pool cues had been pawned the prior day at approximately 9:40 am. Officers were provided with a pay receipt and video surveillance, which showed Defendant pawning the items. On February 11, 2016, officers were able to track B.R.'s cell phone to the Casey's General Store, located at 315 Broadway, Highland, Illinois, where they located a 2002 blue GMC Yukon occupied by co-defendant Khylon Hampton ("Hampton") and two other individuals. Hampton was in possession of B.R.'s and M.U.'s phones.[2]

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[2] Investigation has revealed that prior to the carjacking, Defendant, Graham, and Hampton were occupying the blue GMC Yukon and that Defendant and Graham exited the Yukon to commit the carjacking. Thereafter, Hampton, driving the Yukon, followed Defendant and Graham as

On March 6, 2016, Defendant was taken into custody on an unrelated robbery in East St. Louis, Illinois. Defendant was then extradited to St. Louis, Missouri, after warrants were issued relative to an armed carjacking occurring on February 7, 2016, in downtown St. Louis, Missouri.[3] While at the St. Louis City Justice Center, Defendant was placed in a physical lineup. Defendant was afforded the opportunity to select his position in the lineup and chose position #1. Three other individuals who shared the same or similar physical characteristics as Defendant were included in the lineup, which was then photographed.[4]

The photographic lineup was presented to M.U. and B.R. on April 6, 2016, at the Central Patrol Division. Detective Anton Treis, acting as a blind administrator, showed the photographs to each of the victims separately. The victims were not allowed to communicate with each other during the process. Detective Treis informed both of them that the lineup may or may not have in it a photograph of the individual who carjacked and kidnapped them and that they were under no obligation to make a selection. Both victims were shown all four photographs included in the lineup.

B.R., outside the presence of M.U., was presented with the photo lineup first. When B.R. viewed Defendant's photograph, *i.e.*, photograph #1, she began to physically shake and positively

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they drove the victims to Illinois. Hampton then picked up Defendant and Graham after they released the victims and the victims' vehicle became disabled.

[3] The armed carjacking occurring on February 7, 2016, was captured on surveillance video. During an interview with SLMPD, Defendant identified himself on the video, but claimed that he borrowed the car from the victim in exchange for controlled substances. Investigation has revealed that Denton's explanation is false. Defendant has been charged in Counts One and Two of the Indictment with the February 7, 2016, carjacking.

[4] A copy of the photographic lineup presented to the victims is attached hereto and incorporated herein as Government's Exhibit 1. The photograph depicting all four individuals together was not presented to the victims.

identified him as the individual who carjacked and kidnapped her. B.R. initialed and dated Defendant's photograph and completed a Lineup Viewing Form, wherein she indicated that she was "certain" she made a correct identification of the suspect.[5] Thereafter, M.U. was presented with the photo lineup outside the presence of B.R. M.U. also identified Defendant's photograph, *i.e.*, photograph #1, as the individual who carjacked and kidnapped him. M.U. initialed and dated Defendant's photograph and completed a Lineup Viewing Form, wherein he indicated that he was "certain" he made a correct identification of the suspect.[6]

III. ARGUMENT

In *Perry v. New Hampshire,* 132 S. Ct. 716, 724 (2012), the United States Supreme Court reiterated that courts should use a two-part approach to determine whether the Due Process Clause requires suppression of an eyewitness identification allegedly tainted by police arrangement. The Court explained that "due process concerns arise *only* when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Id.* (emphasis added) (citing *Manson v. Brathwaite*, 432 U.S. 98, 107, 109, 97 S.Ct. 2243 (1977)). But "[e]ven when the police use such a procedure . . ., suppression of the resulting identification is not the inevitable consequence." *Id.* Rather, the second step of the undue suggestiveness framework requires an inquiry into "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." *Neil v. Biggers*, 409 U.S. 188, 199, 93 S.Ct. 375 (1972). If an identification resulting from an unduly suggestive procedure is nevertheless

[5] A copy of the Lineup Viewing Form completed by B.R. is attached hereto and incorporated herein as Government's Exhibit 2.
[6] A copy of the Lineup Viewing Form completed by M.U. is attached hereto and incorporated herein as Government's Exhibit 3.

deemed reliable, it is admissible "[n]otwithstanding the improper procedure" used by the police. *Perry*, 132 S.Ct. at 725; *see also United States v. Harris*, 636 F.3d 1023, 1026 (8th Cir. 2011) ("'Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'" (quoting *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967 (1968)).

One court has explained the process of reviewing identifications as proceeding in a "linear fashion." *Howard v. Warden, Lebanon Correctional Inst.*, 519 Fed. Appx. 360, 366 (6th Cir. 2013). There, the court succinctly explained:

> When determining whether to suppress an eyewitness identification, a court should not consider the reliability of eyewitness evidence, *i.e.*, engage in part two of the test, unless the defendant satisfies the requirement of part one by proving that the police employed an unduly suggestive identification procedure. *See Perry*, 132 S.Ct. at 725-26; (citation omitted). Put differently, if there is no showing that police employed an unduly suggestive procedure to obtain an identification, the unreliability of the identification alone will not preclude its use as evidence at trial. Instead, such reliability should be exposed through the rigors of cross-examination.

Id. at 366-367. As the Court in *Perry* added, "[w]hen no improper law enforcement activity is involved," reliability is better tested with tools such as "the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." *Perry*, 132 S.Ct. at 721; *see also United States v. Rivera-Rivera*, 555 F.3d 277, 282 (1st Cir. 2009) ("Although introduction of 'impermissibly suggestive' identification evidence may violate the Due Process Clause, we have stated repeatedly that identification evidence should be withheld from the jury only in extraordinary cases.") (internal quotations omitted).

A. The Lineups Were Not Impermissibly Suggestive.

The photographic lineup procedures used in this case were not suggestive in any respect, let alone impermissibly so. The victims viewed the sequential photographic lineups consisting of Defendant and three other foils or distractors. *See United States v. Rose*, 362 F.3d 1059, 1066 (8th Cir. 2004) (affirming denial of motion to suppress a photographic lineup including six pictures of individuals with same basic features as not impermissibly suggestive). Detective Treis did not say or do anything that suggested to the victims which individual, if any, was the target of the investigation. Instead, the victims were specifically instructed that the individual who was involved in the carjacking and kidnapping may or may not be in the lineup and that they were not required to pick a subject.

Moreover, though not argued by Defendant in his motion, the content of the photographic lineup also was not suggestive. As evidenced by Government's Exhibit 1, each one of the subjects was an African American male possessing relatively the same amount of facial hair, similar hairstyles, and appearing to be generally the same age. Most importantly for purposes of this analysis, each subject matched the general description of the suspect provided by the victims in all other respects. The law is clear: "A lineup of clones is not required." *United States v. Galati*, 230 F.3d 254, 260 (7th Cir. 2000) (citing *United States v. Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998)). Perfect identification procedures are not mandated, but only fair ones. *United States v. Devault*, 190 F.3d 926, 930 (8th Cir. 1999). Furthermore, the backgrounds of the photographs are the exact same, as the each of the photographs were taken against the same concrete wall. *United States v. McComb*, 249 Fed.Appx. 429, 440 (6th Cir. 2007) ("A darker hue or different colored background does not 'in [itself] create an impermissible suggestion that the defendant is the offender.'") (quoting *United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir. 1999)); *see also United*

States v. Knight, 382 Fed.Appx. 905, 907 (11th Cir. 2010) ("Although Knight was of a lighter complexion than four of the other individuals in the array and the background lighting in his photograph was slightly different from some of the other photographs, neither of these differences were [sic] stark enough so as to be unduly suggestive.").

In fact, no "impermissible suggestion" has been found in situations involving physical discrepancies of lineup subjects greater than those that may be suggested by the Defendant in this instance. For example, in *United States v. Galati*, two bank tellers identified the defendant as the bank robbery suspect after separately viewing a photographic lineup comprised of the defendant and five other subjects. The robbery suspect was initially described by tellers as having short brown hair, with little showing underneath the baseball cap he wore. *Galati*, 230 F.3d at 259. Of the six subjects, the defendant argued that four had long hair while two (including the defendant) had short hair. Of the two subjects with short hair, the defendant was the only one with brown hair. Four subjects were older looking than the defendant. Three subjects, including the defendant, were wearing chains around their respective necks. In denying the defendant's motion to suppress, the court concluded that the six men pictured fit the general descriptions offered by the tellers. *Id.* at 260. The differences identified by the defendant were "not substantial ones," and were "not overly conspicuous and...still fit the descriptions given by the witnesses." Therefore, the court held:

> As such, we see nothing in the photo array that would have caused the bank tellers to pick out [the defendant] as opposed to any of the other five men pictured (except of course the fact that [the defendant] was indeed the bank robber in question).

Id.

Similarly, in *United States v. Isom*, 138 Fed. Appx. 574, 582 (4th Cir. 2005), the court concluded that the photographic lineup utilized to identify a bank robber was not unduly suggestive where, of the six subjects pictured, five had short hair (including the defendant) and one had long hair. Four of the subjects were looking directly at the camera, two were not (including the defendant). Two of the subjects were wearing t-shirts, three were wearing regular shirts, and one was wearing a sweat shirt. Five of the subjects had some degree of facial hair while one had none. None of these discrepancies indicated to the court that the lineup was unduly suggestive. *Id.* at 582.

The photographic identification procedures used in this case were far from impermissibly suggestive and certainly do not give rise to a very substantial likelihood of irreparable misidentification. Accordingly, the Court need not consider part two of the test, *i.e.*, the reliability of the identifications, and should deny Defendant's motion to suppress the identifications on this ground alone. *See Perry*, 132 S.Ct. at 725-26

B. The Identifications Were Reliable Under the Totality of the Circumstances.

Even if this Court were to find that the lineups were impermissibly suggestive, the reliability of the identifications is such that there is no likelihood of mistaken identity. To assess reliability, the Court should consider:

(1) The witnesses' opportunity to view the defendant at the time of the crime;

(2) The witnesses' degree of attention at the time of the crime;

(3) The accuracy of the witnesses' description of the defendant prior to the identification;

(4) The witnesses' level of certainty when identifying the defendant at the confrontations; and

(5) The length of time elapsed between the crime and the confrontation.

Neil, 409 U.S. at 199-200; *United States v. Hadley*, 671 F.2d 1112, 1115-16 (8th Cir. 1982). Under the totality of the circumstances, the facts of this case indicate that the identifications were reliable.

Here, the victims had an excellent opportunity to view Defendant at close range and for an extended period of time. In fact, the victims were not only carjacked by Defendant, whose face was not covered, but also were held captive by Defendant as Graham drove them into East St. Louis, Illinois; through a drive-through ATM; back across a portion of the Eads Bridge; and then to the Casino Queen. During that time, Defendant, who was the passenger in the vehicle, held them at gunpoint and threatened to shoot and kill them. Obviously, both victims had ample opportunity to view Defendant and certainly more than just the "back of his head" as alleged by Defendant.

Also contrary to Defendant's assertion, the victims' description of him was quite accurate. The victims described the male suspect, *i.e.*, Defendant, as being an African American male approximately 6'00" tall, 200 pounds, and 28 years old. Defendant is an African American male who at the time of the incident was 26 years old. Furthermore, as admitted by Defendant to the Pretrial Services Office (and as is obvious by merely looking at Defendant), Defendant is approximately 5'11" tall and 210 pounds.

The victims also were substantially certain of their identifications. In fact, upon viewing the photographic lineup, the victims immediately and without hesitation identified the Defendant as the person who carjacked and kidnapped them. Furthermore, less than two months elapsed between the incident and the victims' identification of Defendant. Courts have held identifications reliable where a significantly greater period of time elapsed between the incident and identification. *See, e.g., Rivera-Rivera*, 555 F.3d at 284 (six months); *United States v. Henderson*, 320 F.3d 92, 100, 101 (1st Cir. 2003) (two and one-half years); *United States v. Flores-Rivera*, 56 F.3d 319, 331 (1st Cir. 1995) (seven years); *United States v. Peterson*, 411 Fed.Appx. 857, 865 (6th Cir. 2011) (one year and eight months); *United States v. Clark*, 319 Fed.Appx. 395, 402-03 (6th Cir. 2009) (five years); *United States v. West*, 523 Fed.Appx. 602, 605 (7th Cir. 2012) (four years).

Lastly, the Court also may consider the other evidence of Defendant's guilt, including, among other things, the fact that Defendant was captured on video surveillance pawning the victims' property the same morning of the carjacking and committing another carjacking in downtown St. Louis, Missouri, two days earlier. *See Griffin v. Delo*, 33 F.3d 895, 909-919 (8th Cir. 1994). Under the totality of the circumstances, the identifications were reliable and should not be suppressed.

IV. CONCLUSION

For the foregoing reasons, the United States of America respectfully requests that the Court deny Defendant's motion to suppress the identifications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2017, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

All Attorneys of Record for Defendant.

/s/ Sayler A. Fleming
SAYLER A. FLEMING, #58775MO
Assistant United States Attorney